APPENDIX D

Petitioner's dealings with the Clerk's office

The first *per curiam* memorandum of March 29 errs in finding that petitioner was not led to believe certain things by the clerk's office, and in rebuking petitioner for reliance on the printer. (Mandamus petition pp. 1a, 2a.) This is what happened.

1. Blanchard Press, Inc., was engaged as petitioner's printer on the recommendation of the Deputy Clerk of the Court of Appeals in Boston, who recommended it as the court's own contract printer and as being knowledgeable about the court's printing requirements.

The printer's knowledgeability was needed, because petitioner's general counsel (who handled the matter) has resided in Washington since 1941 (only maintaining a Boston office specially for B&P affairs) and because the practice of the First Circuit proved to be stricter than in the D.C. Circuit, and rather abstruse. The Clerk has served 40 years and is the procedural *eminence grise* of the Boston federal court house. The Deputy Clerk is also experienced and learned. Being less active than the other circuits the Clerk's office in the First Circuit is in a better position to weave the niceties.

2. Petitioner of course appealed under Civil Rule 73 (b), which allowed 60 days for the notice of appeal.[1] *Petitioner accelerated the appeal by a full month.* If petitioner had used all the time allowed, the perfected appeal

---

[1] The Kynett Committee's denial of this is not to be taken seriously. The B&P source manual (the existing printed Record Appendix, volume II, pages 847a and 848a) shows that its counsel's late senior partner filed an appeal in this case in 1956 under Rule 73(b). The B&P Corporation's appeal was entitled "Notice of Appeal to Court of Appeals under Rule 73(b)". The Civil Rule governs. This is not a bankruptcy proceeding, but reorganization in equity using some procedures of the Emergency Railroad Transportation Act of 1933. Those procedures got inserted into the United States Code under Title 11, Bankruptcy, *faute de mieux.*

would have come on for oral argument properly in the June sitting without difficulty. Petitioner accelerated the appeal in order to get the record "upstairs" in the appellate clerk's office where it could be worked on effectively in a workroom. Unlike other railroad reorganizations, the B&P record is not printed currently by the district court or the estate, and after 29 years it has become a sprawling mass in the filing cabinets of the district court clerk's office, a bustling place where counsel may no longer work on files behind the counter. Petitioner followed the efficient procedure worked out last time to get the B&P files moved upstairs as soon as possible. Petitioner followed the routine of the first appeals by *then* moving for a month's extension to perfect the appeal — in the Court of Appeals. (Had delay been obtained in the District Court, its busy office would not have assembled and transmitted the record upstairs to be dealt with in the workroom.)

Although the Court of Appeals under Chief Judge Magruder had granted the month's extension last time as a matter of course, the Court now denied it, by an order signed by the Clerk.

3. The court rules only allowed petitioner five days to work on the record before designating. A large part of the record was not sent up. It was discovered that the exhibits in the I.C.C. hearings of 1964 and 1965 were missing, apparently never having left Washington. The seven transcripts of those hearings were not located until some time afterward. Under all the circumstances designation by February 22 was impossible.

Petitioner presented the predicament in the workroom to the Clerk, who explained that (1) the month's extension was denied because it would have postponed the oral argument from the May sitting to the June sitting; (2) the court was flexible about extensions which would not postpone the oral argument; (3) the designations were not

filed in the record, but were only *furnished* to appellees to guide them in selecting their own future submissions; (4) no appeal has ever been dismissed in the court for delay in appellant's designations; (5) the court would entertain a motion to extend the time within the framework allowed by the May sitting. Hence petitioner applied for and received an extension until March 10, and then "furnished" its designations of 204 items which petitioner "proposed to print".[2]

The distinction between filing and furnishing is one of the niceties. *Petitioner has never been jurisdictionally defective in any aspect of the appeal.*

4. Next came the printing and the brief. *Petitioner's 204 designations only covered new material not already printed in the existing Record Appendix,* which was printed for the first appeals and which for 10 years has formed the only Boston & Providence Railroad Reorganization source manual. The B&P stockholders printed Volumes I and II at expense exceeding $7,000, which has not been reimbursed.[3] The New Haven printed Volume III.

The major items for new printing were extracts from the I.C.C. plan hearings. As soon as they could be released by the three lawyers working on the compensation brief due March 20 (see mandamus petition, p. 15) counsel took them to the printer. (The Clerk's office would not release the original for printing.)

In a planning conference the printer advised the use of the old printed record, citing the recent example of the *Northeast Airlines* appeals where that was done in the First

---

[2] The mandamus petition inadvertently says "filed" where it should have said "furnished". (Page 16, paragraph 3.)

[3] The B&P Corporation was co-appellant (then having different counsel) but did not contribute. The B&P trustee opposed the 1957 appeals with the New Haven (unlike the present situation). Reimbursement was requested in compensation petitions sent to the I.C.C. over a year ago. I.C.C. action is awaited.

Circuit. He named Monday, April 3, as his production date for the new record volume and the printed brief (containing the R.A. page citations).

5. Petitioner then consulted the Deputy Clerk, who confirmed the occasional practice of using the same record appendix for consecutive appeals, but said it should be covered by a formal request for permission. He also said that there must be a copy for each new judge and any new appellee. *Petitioner assured the Deputy Clerk that counsel had saved unused copies* printed for possible Supreme Court use in 1957 — enough for the three new judges and for the single new appellee.

6. Petitioner then drew a motion requesting permission (1) to use the existing Record Appendix, (2) to begin the new Volume IV with right-hand page 1215a; and (3) to file the new record volume and brief by April 3. Petitioner submitted the motion for the comment of the Deputy Clerk, who said that it was in order, but that it should be changed to accelerate the filing date from April 3 to Friday March 31, for this technical reason. If appellant should file on April 3, that would allow appellees until April 24 for their filing (under a 21-day rule) which would be only a week before the May sitting. He said that was not time enough. Petitioner said that it would be willing to waive a reply brief. The Deputy Clerk said that one week before the sitting (*i.e.*, Monday April 24) the Clerk would prepare the calendar of cases to be called May 1, and that the list would then be printed — and *the Clerk strongly disliked having to strike the name of a case off the list after it had been put on.*

He said that by filing March 31, petitioner would accelerate appellees' deadline to Friday April 21, so that by Monday it would be known whether the case should go on the calendar or whether appellees required an exten-

sion. *Petitioner said that it would gladly consent to any reasonable extension for appellees.*

Petitioner altered the April 3 date on the face of the motion to March 31 and filed it, notifying the printer, who accepted the new deadline.

7. After negotiations with the clerk's office extending over several days petitioner filed the motion on March 21. Three days are allowed for answers. The New Haven *apparat* answered by moving to dismiss the appeal for failure to file the printed record and brief by March 22. The motion characterized petitioner's behaviour reported above as "utter disregard for this Court". It also, with equal inaccuracy, accused petitioner of requesting to be relieved of reprinting certain parts of "the record said to have been printed in connection with a prior appeal in this matter".[4]

8. On Good Friday afternoon, March 24, the court issued an order signed by the Clerk (1) rejecting the existing Record Appendix, (2) refusing to allow page continuity, (3) refusing any extension of time.

However, the Court's order did not dismiss the appeal.

9. Petitioner and the printer attacked the new burden of reprinting.

One technical problem was that, by forbidding the new volume to begin with page 1215a, the court made it impossible to reduce the new material (which was largely typeset) to pages. It could not begin with *any* page number, because the old material for reprinting must go in first.

---

[4] Appellees realized that the designations were limited to items placed in the record after the old printing. In addition to those 204 designations, petitioner alluded to some unspecified lease clauses, planning to reprint those with argumentative editing — as was indeed done. See Appendix C, page B-1 ff. That did not displace the basic printing of all three leases, Exhibits 6, 7, 39, which were already printed. All three appellees participated in the old printing.

Petitioner was limited in the amount of old material that it could reprint by financial stringency. Already expenses for 1967 had exceeded $6,500, including $2,300 for the transcript of the compensation hearing in January. The printing estimate called for another $2,500. The reprinting would increase that. Petitioner perforce selected less than the fair minimum for reprinting.

10. The court left the dismissal question open. Petitioner and the printer strove to complete the printing and filing before the court should act. On the morning of March 29 the printer called on the Clerk and privately informed him that with the added material the March 31 deadline was impossible. The Clerk conferred with the Chief Judge, and that afternoon the Memorandum and dismissal were issued. Reconsideration was denied on April 18.

11. No judge of the court ever granted petitioner a hearing or conference. Otherwise petitioner does not believe that the summary dismissal would have occurred.

12. The Clerk discussed the matter with petitioner's counsel after each denial. He explained considerations which seemed to him to justify the disposition taken. He said that it was improper to ask an appellate court to extend time so that counsel could complete briefs for an inferior body, the I.C.C. He said if appellant's counsel could not meet the deadlines he should engage additional counsel rather than seeking extensions. He said that the judges ought not to be burdened with an old Record Appendix, because it included a lot of material that would not actually be used. He said that if petitioner had asked him, he would have allowed petitioner to distribute temporary typewritten copies of the brief and appendix. (That, however, would be as difficult as printing.) On the other hand he admitted that if April had 31 days

the dilemma would not arise, because the May calendar would be called a week later.

13. Immediately upon receiving the dismissal petitioner stopped the R.A. printing. Petitioner tendered the brief without R.A. citations. Petitioner paid the printer's bill for $1,345.52 for the abortive job.